

**COURT OF APPEALS
DECISION
DATED AND RELEASED**

August 17, 1995

A party may file with the Supreme Court a petition to review an adverse decision by the Court of Appeals. See § 808.10 and RULE 809.62, STATS.

NOTICE

This opinion is subject to further editing. If published, the official version will appear in the bound volume of the Official Reports.

No. 93-3064

STATE OF WISCONSIN

IN COURT OF APPEALS
DISTRICT IV

IRENE RAFALSKI,

Plaintiff-Respondent,

v.

EDWARD DUSZA, a/k/a ANDRE R. PORAY,
A.R. PORAY, KRZYSZTOF, BUERDEK,
CHRISTOPHER, BUEREK, APP, EID, AP
and MARIAN A. POREMSKI,

Defendants-Appellants.

APPEAL from a judgment and an order of the circuit court for Portage County: JOHN V. FINN, Judge. *Affirmed.*

Before Gartzke, P.J., Dykman and Vergeront, JJ.

PER CURIAM. Edward Dusza appeals from a default judgment and from an order denying his motion to reopen that judgment. The issues are whether the trial court erroneously exercised its discretion when it granted the default judgment and when it denied the motion to reopen that judgment, and

whether the damage award is clearly erroneous. We conclude that the trial court properly exercised its discretion and that its damage award is not clearly erroneous. We therefore affirm.

Irene Rafalski sued Dusza for breach of contract, fraud, and breach of agency and fiduciary duties based on his mismanagement of her business and real estate affairs. The trial court entered a default judgment against Dusza because he did not attend the final pretrial conference, as had been ordered. After denying Dusza's motion to reopen, the trial court held an evidentiary hearing and found Rafalski's damages were \$65,784.40. Dusza appeals.

We will not reverse a default judgment or an order denying a motion to reopen that judgment, unless the trial court erroneously exercised its discretion. *Gaertner v. 880 Corp.*, 131 Wis.2d 492, 500, 389 N.W.2d 59, 62 (Ct. App. 1986). Section 802.11(5)(c), STATS., authorizes a trial court to enter a default judgment for failure to attend a pretrial conference. However, to justify entering a default judgment against a party for failure to participate in a pretrial conference, the party's conduct must have been egregious. *Schneller v. St. Mary's Hospital*, 162 Wis.2d 296, 311, 470 N.W.2d 873, 878-79 (1991).

The trial court granted a default judgment to the plaintiff on the issue of liability on all claims on grounds that Dusza's conduct had been egregious and in callous disregard for the court's orders for various reasons. Dusza had failed to appear at the final pretrial conference in accordance with the court's previous scheduling order, entered following a conference which Dusza had personally attended. Dusza had failed to be excused from the personal attendance requirement at the final pretrial conference before it was scheduled to commence. He personally had appeared in the Portage County courthouse on the date of the pretrial conference and filed a document with the clerk of court concerning this action shortly after 11:00 a.m. At that time, he did not advise the court or office personnel of his inability to attend the pretrial conference scheduled for 1:30 p.m. As a result of Dusza's failure to appear at the scheduled time of 1:30 p.m., the court had its staff page him twice on the courthouse intercom before commencing the conference in case he was in the building and did not know where to go. The court also had the courtroom and the hallway checked to see if he was on the second floor of the courthouse. The court was aware of Dusza's familiarity with the workings of the legal system because of his prior appearances in other proceedings. Finally, a copy of the

court's scheduling order sent to Dusza specifically stated that statutory sanctions were available for failure to comply with the order. These facts justify the court's finding that Dusza's conduct was egregious and support the trial court's exercise of its discretion when entering a default judgment against him.

Dusza nevertheless moved to reopen the default judgment, claiming that he could not attend the pretrial conference because he could not find the courtroom and because he had a very important personal problem involving an emergency with his nephew which Dusza claimed was reported to the police. Rafalski opposed the motion after inquiring with police and sheriff department personnel who told her that there had been no contacts or incidents involving Dusza's family. Because Dusza has not provided us with a transcript of the hearing on the motion for reopening the default judgment, we must assume that every fact essential to sustain the trial court's exercise of its discretion is supported by the record. *Austin v. Ford Motor Co.*, 86 Wis.2d 628, 641, 273 N.W.2d 233, 239 (1979).

Although the trial court denied Dusza's motion to reopen the judgment, the court held an evidentiary hearing on damages. See § 806.02(5), STATS., (if proof of a fact is necessary for court to render a default judgment, the court shall receive the proof). Dusza disputes the damage award, but he failed to furnish a transcript of the hearing. For that reason, we cannot review his claim that the trial court committed factual errors.

We note that the trial court found that much of Dusza's testimony was incredible. The court specifically found that Dusza's

credibility is extremely suspect and, in fact, finds much of Mr. Dusza's testimony to be incredible, particularly in light of ... his express admission that he had committed a burglary ...; his use of aliases in an attempt to lead the plaintiff to believe that the book manufacturer with whom she thought she was dealing was someone other than himself; and ... his self-dealing conduct in attempting to unilaterally enter into contracts on behalf of the plaintiff and himself ... through the use of a power of attorney that

was given to him by the plaintiff solely for the handling of real estate transactions and the management of investment real estate purchased by the plaintiff through Mr. Dusza.

Without a transcript, we cannot review these determinations. We conclude that Dusza has not shown that the damage award is clearly erroneous, the test we must apply under § 805.17(2), STATS. We affirm the award.

Dusza raises a variety of other issues, all going to the merits of the plaintiff's case but not related to the default judgment and order from which he appeals. For us to review those issues would have no effect on the result in this appeal. We do not review claimed errors when a resolution of them would have no effect on an existing controversy before us. *Racine v. J-T Enters.*, 64 Wis.2d 691, 700, 221 N.W.2d 869, 874 (1974).

We conclude that the judgment and order must be affirmed.

By the Court.--Judgment and order affirmed.

This opinion will not be published. See RULE 809.23(1)(b)5, STATS.